

FILED
03-11-2025
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2024AP1012-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NICHOLAS L. SPARBY-DUNCAN,

Defendant-Appellant.

On Appeal from a Nonfinal Order Denying a Motion
to Dismiss Entered in the Dunn County Circuit
Court, the Honorable James M. Peterson Presiding.

REPLY BRIEF OF
DEFENDANT-APPELLANT

DAVID MALKUS
Assistant State Public Defender
State Bar No. 1094027

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
malkusd@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

	Page
ARGUMENT	3
I. The PAC and IID charges are unconstitutional as applied to Mr. Sparby-Duncan because they rest on his prior refusal to submit to a warrantless blood draw.	3
CONCLUSION.....	6
CERTIFICATION AS TO FORM/LENGTH.....	7

CASES CITED

<i>North Dakota v. Birchfield</i> , 579 U.S. 438 (2016)	4
<i>State v. Dalton</i> , 2018 WI 85, 383 Wis. 2d 147, 914 N.W.2d 120	3, 4
<i>State v. Forrett</i> , 2022 WI 37, 401 Wis. 2d 678, 974 N.W.2d 422	3, 4, 5

CONSTITUTIONAL PROVISIONS CITED

<u>United States Constitution</u> U.S. CONST. amend IV	4, 5
---	------

ARGUMENT

I. The PAC and IID charges are unconstitutional as applied to Mr. Sparby-Duncan because they rest on his prior refusal to submit to a warrantless blood draw.

In opposing dismissal of the PAC and IID charges, the State rehashes the same arguments the Wisconsin Supreme Court already rejected in *State v. Forrett*, 2022 WI 37, 401 Wis. 2d 678, 974 N.W.2d 422. First, the State asserts that while Mr. Sparby-Duncan would not face the PAC and IID charges but for his prior warrantless blood draw refusal, “any potential criminal punishment would be for failing to install the IID” and “driving with a prohibited alcohol concentration” rather than the refusal. (Response Br. at 11-12). This assertion mirrors the State’s argument in *Forrett* that enhanced penalties for an OWI based on a prior refusal merely punish drunk driving more severely rather than directly punishing the refusal. *See* 2022 WI 37, ¶15. In rejecting this argument, the Wisconsin Supreme Court recognized that it is impermissible to impose criminal penalties in connection with a warrantless blood draw refusal even when these penalties only indirectly punish the refusal. *Id.*, ¶¶16-17; *see also State v. Dalton*, 2018 WI 85, ¶63, 383 Wis. 2d 147, 914 N.W.2d 120 (“the fact that refusal is not a standalone crime does not alter our analysis.”).

Next, the State argues that “*Birchfield*, *Dalton*, and *Forrett* [do not] say that a person’s failure to comply with an IID order cannot be criminalized.” (Response Br. at 11). But the State entirely overlooks the core principle on which these cases rest, which is that “it is unconstitutional in *all circumstances* to threaten criminal penalties for refusing to submit to a warrantless blood draw.” *Forrett*, 2022 WI 37, ¶11 (emphasis) (citing *North Dakota v. Birchfield*, 579 U.S. 438, 476-78 (2016); *Dalton*, 2018 WI 85, ¶¶61-66). Here, as the State concedes, Mr. Sparby-Duncan faces criminal penalties for the PAC and IID charges that he would not face but for a prior warrantless blood draw refusal. (Response Br. at 12). Because it is unconstitutional in all circumstances to threaten both direct and indirect criminal penalties based on a refusal to submit to a warrantless blood draw, the threat of these penalties in the instant case is impermissible. See *Forrett*, 2022 WI 37, ¶9 (“*No matter the form the criminal penalty takes, the state cannot impose such a penalty on a person because she exercised her Fourth Amendment right.*”) (Emphasis added).

The State further argues that “[a]n IID order has nothing to do with a search, whether a reasonable or unreasonable one, and Sparby-Duncan had no constitutional right to ignore it.” (Response Br. at 12). But while an IID order is not itself a search, what matters is the threat of criminal penalties that are based on a prior refusal of a warrantless blood draw. See *Forrett*, 2022 WI 37, ¶12 (both the “threat of an increased criminal penalty in a subsequent case” and

the “realization” of the threat violate the Fourth Amendment’s protection against unreasonable searches). Moreover, the instant appeal does not concern whether there is a constitutional right to ignore an IID order any more than *Forrett* concerned whether there is a right to drive drunk. The constitutional right at issue in both cases is the right to refuse a warrantless blood draw without the threat of criminal penalties in a separate and subsequent case.

Finally, the State suggests that Mr. Sparby-Duncan’s case is distinguishable from *Forrett* because the blood draw in that case “meant that the driver would forever be subject to a longer criminal penalty if he was later convicted of an OWI[.]” (Response Br. at 13). This is no distinction at all, however, because the driver in *Forrett* would forever be subject to criminal penalties only if drove drunk, just as here, the State’s position would result in Mr. Sparby-Duncan forever being subject to criminal penalties if he did not install an IID and did not reinstate his license. And regardless, the State does not develop any argument to explain the relevance of this purported distinction. As explained above, it is not dispositive whether the threat of criminal penalties is direct or merely indirect, nor whether the threat is permanent or merely temporary. What matters instead is that the threat of criminal penalties would not exist but for a prior refusal of a warrantless blood draw. *See Forrett*, 2022 WI 37, ¶¶11-12, 16-17. Because Mr. Sparby-Duncan would not face the PAC and IID charges but

for his exercise of a constitutionally-protected right, these charges are unconstitutional as applied to him.

CONCLUSION

For the reasons stated above and in his initial brief, Mr. Sparby-Duncan respectfully requests that this Court reverse and remand to the circuit court with instructions to dismiss his PAC and IID charges.

Dated this 11th day of March, 2025.

Respectfully submitted,

Electronically signed by

David Malkus

DAVID MALKUS

Assistant State Public Defender

State Bar No. 1094027

Office of the State Public Defender

735 N. Water Street - Suite 912

Milwaukee, WI 53202-4116

(414) 227-4805

malkusd@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 792 words.

Dated this 11th day of March, 2025.

Signed:

Electronically signed by

David Malkus

DAVID MALKUS

Assistant State Public Defender